

**SANITIZED DECISION – DOCKET NOS. 06-020 MFE, 06-021 MFE,
06-022 MFE, 06-023 MFE, 06-042 MFE, 06-038 MFE, 06-019 MFE & 06-149 MFE –
BY GEORGE V. PIPER, ALJ -- SUBMITTED for DECISION on APRIL 18, 2006 –
ISSUED on APRIL 24, 2006**

SYNOPSIS

**MOTOR FUEL EXCISE TAX—BURDEN OF PROOF NOT MET FOR
VACATING CIVIL PENALTY** – Because the provisions of W.V. Code § 11-14C-34(a) – (f) make crystal clear that the predicate act of transporting fuel without the proper shipping documentation and without meeting the exception set forth in W.Va. Code § 11-14C-34(d)(A) – (D) mandates that the civil penalty shall be payable by the person in whose name the shipping document was issued, this limited-jurisdiction, executive-branch tribunal does not have the statutory authority to waive or abate the penalty.

FINAL DECISION

On November 9, 2005, November 16, 2005, November 18, 2005, and December 12, 2005, respectively, the Excise Tax Unit of the Internal Auditing Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) issued four (4) separate motor fuel excise tax assessments against the Petitioner’s Company B. The assessments were issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 14C of the West Virginia Code. The assessments were all for the period ended November 30, 2005, and each was for a civil penalty in the amount of \$, for a total liability of \$. Written notice of these assessments was served on the Petitioner as required by law.

On January 6, 2006, the Commissioner (by the Division) issued a motor fuel excise tax assessment against the Petitioner’s Company B, under the provisions of Chapter 11, Articles 10 and 14C of the West Virginia Code, for the period ended December 31, 2005, for a civil penalty in the amount of \$. Written notice of the assessment was served on the Petitioner as required by law.

On March 7, 2006, the Commissioner (by the Division) issued a motor fuel excise tax assessment against the Petitioner’s Company B, under the provisions of Chapter 11,

Articles 10 and 14C of the West Virginia Code, for the period ended March 31, 2006, for a civil penalty in the amount of \$. Written notice of the assessment was served on the Petitioner as required by law.

Thereafter, by mail postmarked January 17, 2006 and March 23, 2006, respectively, the Petitioner's Company B, timely filed with this tribunal, the West Virginia Office of Tax Appeals, petitions for reassessment. *See* W. Va. Code § 11-10A-8(1) [2002] and 11-10A-9(a)-(b)[2002].

On November 15, 2005, the Commissioner by the Division issued a motor fuel excise tax assessment against the Petitioner's Company C. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 14C of the West Virginia Code. The assessment was for the period ended October 31, 2005, for a civil penalty in the amount of \$. Written notice of this assessment was served on the Petitioner as required by law.

On February 1, 2006, the Commissioner (by the Division) issued a motor fuel excise tax assessment against the Petitioner's Company C, under the provisions of Chapter 11, Articles 10 and 14C of the West Virginia Code, for the period ended January 31, 2006, for a civil penalty of \$. Written notice of the assessment was served on the Petitioner as required by law.

Thereafter, by mail postmarked January 4, 2006 and February 14, 2006, respectively, the Petitioner's Company C, timely filed with this tribunal, the West Virginia Office of Tax Appeals, petitions for reassessment. *See* W. Va. Code § 11-10A-8(1) [2002] and 11-10A-9(a)-(b)[2002].

By letter dated February 13, 2006, Company A, which is the parent company of both Company B and Company C, requested that all eight (8) petitions for reassessment be converted from small claim treatment to that of regular hearing status.

In due course the presiding administrative law judge consolidated all of the matters for decision on documents only, in lieu of holding a hearing in person, because he determined (and the parties agreed) that their appearances in person were not necessary in order to render a decision on the merits.

FINDINGS OF FACT

1. In December, 2004 and April, 2005, all motor fuel licensees, including the Petitioners, were sent a memo entitled, “West Virginia Motor Fuel Registration System – Important Notice – Effective June 1, 2005 advising all concerned that every person transporting fuel by barge, water craft, railroad tank car, or transport truck was required to deliver the motor fuel in the destination state printed on the shipping document unless the person to whom the shipping document was issued:

(A) Notifies the Tax Commissioner, **BEFORE** transporting the motor fuel into a state other than the destination state printed on the shipping document, that he or she has received instructions, after the shipping document was issued, to deliver the fuel to a different destination state;

(B) Receives from the Tax Commissioner a confirmation number authorizing the diversion;

(C) Writes on the shipping document the change in destination state and the confirmation number for the diversion; and

(D) Gives a copy of the revised shipping document to the person to whom the motor fuel is delivered. This document does not need to show the gallons delivered to each location. This document is used to verify proper licensing of the importer, transporter, distributor and supplier, and the destination state, etc. *See* W.Va. Code § 11-14C-34(d) (A) – (D).”

2. Additionally, Petitioner’s Company C was re-notified by certified mail dated October 5, 2005 (received October 12, 2005) and Petitioner’s Company B was re-notified by certified mail dated October 11, 2005 (received October 18, 2005) of the diversion reporting requirements, as a result of some unreported diversions that Petitioners made in September and October, 2005.

3. Petitioners admit that they neither transported fuel with the proper shipping documentation nor did they comply with the strict proviso exception contained in the statute.

4. In both petitions for reassessment Petitioners state that their drivers were unable to select West Virginia as a destination state because the terminal operator was the one who advised Petitioners that the terminal operator, itself, would be the one to report the diversions; however, the reporting was not done properly.

DISCUSSION

The only issue to be decided is whether Petitioners have met their burden of proof by showing that the civil penalty imposed pursuant to W.Va. Code §11-14C-34 is not applicable.

W.Va. Code §11-14C-34(d) explicitly states that “a person to whom a shipping document was issued shall . . . (3) Deliver motor fuel to the destination state printed on

the shipping document unless the person meets the exception in 34(d)(A) – (D),” which Petitioners admit is not applicable to them.

W.Va. Code §11-14C-34(f) then provides that any person who transports motor fuel to a destination state other than the destination state shown on the shipping document is subject to a civil penalty for a first offense for each subsequent violation.

Notwithstanding the plain language of the statute, Petitioners argue that the penalties should be waived because of extenuating circumstances, which, for a lack of better term, lets them off the hook; namely, that another entity (terminal operator) had informed them that it, and not the Petitioner, would report the diversions.

Respondent’s counsel argues that the circumstances of these cases do not matter; only that the Petitioners transported fuel without either the proper shipping documentation or without meeting the strict exception provided for in the statute; and that intent is, therefore, irrelevant. Respondent’s counsel noted that Petitioners are repeat offenders which under normal circumstances would negate “reasonable cause” for waiver of additions to tax or penalties; however, such language is absent from W.Va. Code § 11-14C-34 and, therefore, no waiver or abatement provision can be inferred from the plain language of the statute.

This tribunal has scoured Article 14C of the West Virginia Code to find any statutory avenue of relief for the Petitioners. However, the four corners of the statute make crystal clear that, if fuel is transported without the proper shipping documentation and without the exception being applicable, the civil penalty shall be payable by the person in whose name(s) the means of conveyance is registered. See W.Va. Code §11-14C-34(f) (1).

Because there is no provision in the statute to waive or abate the civil penalty for any such extenuating circumstances, this tribunal has no option but to affirm the civil penalty as issued against both Petitioners.

It should be finally noted that because this limited-jurisdiction, executive-branch tribunal does not have the statutory authority to sit essentially as a court of “equity”; we must apply the law as written and may not deviate from that obligation under any circumstances.

CONCLUSIONS OF LAW

Based upon all of the above it is **HELD** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon a petitioner-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003).

2. The Petitioner-taxpayer in this matter have failed to carry the burden of proof with respect to its contention that, based upon the evidence, its companies did not violate the motor fuel excise tax diversion statute. *See* W. Va. Code St. R. § 121-1-69.2 (Apr. 20, 2003).

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the motor fuel excise tax assessments issued against

the Petitioner's Company B, for the period ended November 30, 2005, for a combined civil penalty of \$, must be and are hereby **AFFIRMED**.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the motor fuel excise tax assessment against the Petitioner's Company B, for the period ended December 31, 2005, for a civil penalty of \$, must be and is hereby **AFFIRMED**.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the motor fuel excise tax assessment against the Petitioner's Company B for the period ended March 31, 2006, for a civil penalty of \$, must be and is hereby **AFFIRMED**.

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the motor fuel excise tax assessment issued against the Petitioner's Company C, for the period ended October 31, 2005, for a civil penalty of \$, must be and is hereby **AFFIRMED**.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the motor fuel excise tax assessment against the Petitioner's Company C, for the period ended January 31, 2006, for a civil penalty of \$, must be and is hereby **AFFIRMED**.